

CIV\APN\304\88
 CIV\APN\112\90
CIV\APN\ 50\91

IN THE HIGH COURT OF LESOTHO

In the matter between:-

'MAKEFUOE LIEKETSENG MOLELLE

Applicant

and

LABOUR COMMISSIONER
 ATTORNEY-GENERAL
 ACROL (LESOTHO) (PTY) LTD

1st Respondent
 2nd Respondent
 3rd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 20th day of September, 1991.

On the 20th February, 1991 the applicant moved an ex parte application and obtained a Rule Nisi couched in the following terms:

"1. Rule Nisi, returnable on the 1st day of March, 1991, be and is hereby granted calling upon the Respondents to show cause, if any, why,

(a) the periods of notice prescribed by the Court Rules shall not be dispensed with on the ground of urgency of this application

- (b) the 1st Respondent or his subordinates shall not be restrained and interdicted from paying to the 3rd Respondent or to any other person whosoever certain monies which are yet to be ascertained by the Applicant and which are due and payable by the 1st Respondent to the heir of the late Malefetsane Molelle following his death on the South African mines
- (c) the 1st Respondent shall not be directed to pay to the Applicant forthwith the monies referred to in the preceding paragraph
- (d) in the event of payment having been effected, directing 3rd Respondent to pay the said monies to Applicant forthwith
- (e) 1st Respondent shall not be committed to prison for flouting the order of this Court dated 23rd July, 1990.

2. That Prayer 1 (b) herein operate with immediate effect as an interim interdict."

After several extensions of the rule the matter was finally

argued before me on the 27th August, 1991 when I reserved judgment and extended the rule to to-day.

In her founding affidavit the applicant avers that on the 25th September, 1988 her husband Malefetsane Molelle, who was a mineworker, died at Denmark Colliery in the Republic of South Africa. Following her late husband's death certain monies became payable to his heir but since his heir was still a minor under her guardianship such monies became payable to her. She avers that she has been advised by the officials of the third respondent, whom she verily believes, that the monies paid by a mine in respect of the death of a mineworker fall into categories and are paid in stages according to their categories and not at once as a lump sum. When the mine sends such monies it advises the third respondent and instructs it to inform the deceased mineworker's heir or next-of-kin. The actual payment is made by the first respondent who liaises with the third respondent.

The applicant avers that on or about the 18th October, 1990 one Mr. Mzamo, an official of the third respondent sent for her to come and receive another category of monies payable in respect of her late husband's death. On arrival he gave her some documents which he said she should give to the first respondent. One Mr. Kolobe sent her back to Mr. Mzamo to affix his signature to the documents he had given her. At third respondent's offices Mr. Mzamo said he could not sign the papers because he had just received a telephone call from the first respondent's subordinate

advising that he was sending the money back to Mr. Mzamo for onward transmission to Denmark Colliery as it had been sent by mistake. He said the caller advised him that he had already paid that category of money . Mr. Mzamo expressed surprise at the attitude of the first respondent's subordinates and said that the money in question had been paid following his reminder that it had not been paid.

The applicant denies that he has already received this money and alleges that the intention of the first respondent and his subordinates is always to punish her or make her sweat before they can pay her monies in respect of her late husband's death. Before they released the first category of money due to her, she was bound to move this Court in CIV\APN\112\90 for an order directing the first and second respondent to pay the said money to her. She is now apprehensive that the first respondent and his subordinates will send the money back to the mine as they told Mr. Mzamo.

In his opposing affidavit Mr. Tsoene Kolobe, the Deputy Labour Commissioner and the Acting Labour Commissioner avers that it is correct that some monies are paid by the first respondent, and such monies are Estate Monies, Unclaimed Wages and Compensation Monies. The monies which were paid by his office to the applicant were made up of the monies mentioned above, and those are the monies which are to be paid by his office and they were paid in full.

Mr. Kolobe avers that his office received a voucher from the third respondent. On the same voucher was reflected an amount of M1392.70. It was a deferred pay voucher (See Annexure "TK1"). The voucher was not accompanied by any money at all. Upon perusing their records it emerged that the same amount of M1392.70 being for deferred pay was included in the money which was paid over to his office from South Africa which in turn was paid to the applicant. (See Annexure "TK2" and "TK3"). The documents forming Annexure "TK3" collectively add up to M2464.01 which figure is the same as in Annexure "TK2". His office then sought clarification from the third respondent regarding what appeared to be an obvious double payment of deferred pay. They wanted to know whether the voucher for deferred pay had not been sent to his office by mistake. It was unusual that deferred pay was forwarded to his office and that is the reason why in Annexure "TK3" is written "estate payment". The investigations revealed that Annexure "TK1" was sent to his office by mistake (See Annexure "TK4").

He avers that the applicant did receive the money reflected in Annexure "TK1" and she was told by his office on several occasions that the said money was included in the monies she received from his office pursuant to Annexure "TK2" and "TK3" and these monies were paid in compliance with the Court Order Annexure "MLM1" to the applicant's founding affidavit. The question of contempt of court does not arise because all the monies due for payment to the applicant have been paid to her.

The first difficulty which the applicant is facing is that she is relying on what Mr. Mzamo (an employee of the third respondent) is alleged to have told her. For some reason she has not approached him and asked him to make an affidavit to prove what he is alleged to have said. I think his evidence would have been of vital importance on the question whether or not Annexure "TM1" was accompanied by any money when it was sent to the first respondent. The first respondent alleges that the voucher Annexure "TK1" was not accompanied by any money. His evidence is confirmed by the mine in a telefax dated the 22nd February, 1991 faxed to the Manager of the third respondent and attention to Mr. E. Mzamo.

In the telefax (Annexure "TK4") the mine makes it quite clear that the amount of R1392.70 reflected on L.C.D.P. voucher No. 8427 was included in the payment of R2464.01 which was paid over to the first respondent as reflected Annexure "TK2" dated the 7th December, 1988. Voucher No.8427 was reported lost and Annexure "TK1" was issued to replace the lost voucher. The total amount which was due to the applicant was R2464.01.

It is common cause that the applicant has already received the amount of R2462.01 which is the total amount due to her in respect of the death of her husband. The circumstances under which Annexure "TK1" was issued have been thoroughly explained by the mine in Annexure "TK4". It was issued under the mistaken belief that the original voucher No.8427 in respect of the same amount of

R1392.70 was lost. We now know that the same amount was included in Annexure "TK2" and that it was paid to the applicant per Annexure "TK3" which consists of three Pay Advice Forms. The first one is for an amount of M130.00, the second one is for M991.21 and the last one is for M1342.80. When the amounts appearing in Annexure "TK3" are added they make a total of M2464.01 which was the total amount due to the applicant in respect of the death of her husband.

In the papers before Court the applicant has repeated several times that she does not know how much money is due for payment to her. She repeated that she is still in the process of ascertaining the exact amount. She has failed to come up with any figure till the case was heard. She cannot rely on an obvious mistake and insist that the money which has been paid to her should be paid again because some official of the third respondent as well as official of the mine made a mistake. In order to succeed she must prove on a balance of probabilities that the respondents owe her some money. Even if she could not be sure of the exact sum of money, she ought to have proved that the respondents omitted to pay her some money under a particular category. According to Annexure "TK2" the monies due to the applicant's husband fell under two categories, namely the wages due and deferred pay due. The monies due under the two categories have been paid to the applicant in full.

I am convinced that all the monies due for payment to the applicant have been paid in full by the respondents.

In the result the rule nisi is discharged with costs.


J.L. KHEOLA

JUDGE

20th September, 1991.

For Applicant - Mr Mafisa

For Respondents - Mr. Putsoane